FILE COPY

Office - Supreme Court, U. S
FILED
DEC 20 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 197.

ESTABAN ADAM, PETITIONER,

VS.

WILLIAM SAENGER ET AL., RESPONDENTS.

RESPONDENTS' BRIEF.

OLIVER J. TODD,
Attorney for Respondents.

GEO. E. HOLLAND,
Of Counsel.

INDEX

Opinion of the Court Below 1

Statement As to Jurisdiction of the Court 1

Summary of Argument 8

Argument—

I. The Beaumont Export and Import Company, a Texas corporation, having been legally dissolved prior to the time the action against it was instituted and being nonexistent from that time and at the time the judgment in said action was rendered, such proceeding and judgment is void 8

II. The substituted service of process on Bailey as agent in California of Beaumont Export and Import Company, a Texas corporation, was ineffective as conferring jurisdiction over the person of the company or its representatives authorizing the California court to render the personal judgment against it 9

III. Proceedings had in the California court subsequent to the entry of the judgment here sued on are ineffective as giving to such judgment any validity 9

Conclusion 26

Cases Cited

Abilene S. L. Co. vs. Shackelford, 284 S. W. 622 20

Bank of Alabama vs. Simonton, 2 Tex. 531 21

C., R. I. & P. Ry. vs. Thompson, 100 Tex., p. 189 11

Corsicana Transit Co. vs. Walton, 189 S. W. 307 (s. c. 222 S. W. 979) 19

Cleveland vs. Williams, 29 Tex., p. 214 20

Canada S. R. Co. vs. Gebhard, 109 U. S. 27 L. Ed., p. 1024 22
Comrads vs. Kasch, 26 S. W. (2d) 732 23
Easterline vs. Bean, 49 S. W. (2d), p. 429 13
Ferguson-McKinney D. G. Co. vs. Garrett, 252 S. W. 739 12
G. H. & S. A. Ry. vs. Smith, 81 Tex. 479 21
Hunt vs. Rousmanier, 5 L. Ed. 589 20
John vs. Paullin, 231 U. S., 58 L. Ed. 381 8
Lyon-Gray Lbr. Co. vs. Gibralter Life Ins. Co., 269 S. W. 80 20
Orange Lumber Co. vs. Toole, 181 S. W., p. 825 10
Smith vs. Briggs-Weaver Mch. Co., 132 S. W. 954 25
Witherspoon vs. T. & P. Ry., 48 Tex. 309-319 ..... 19, 23

STATUTES CITED

Texas Civil Statutes, Art. 1728 2
Acts, 1927, 40th Leg., p. 214, Ch. 144, Sec. 1 2
Texas Revised Statute, Art. 1739 3
Texas Revised Statute, Art. 1740 4
Rules of Supreme Court, 121 Texas 745 4
California Statute, Sec. 1015 ..... 16, 17
California Statute, Sec. 442 16
California Code of Civil Procedure, Sec. 1011 16
California Civil Code, Sec. 402 a 17

TEXTBOOKS

Tex. Jur., Vol. II, p. 133, Sec. 469 19
1 Tex. Jur., p. 147, Sec. 106 19
6 C. J., p. 675 20

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 197.

ESTABAN ADAM, PETITIONER,

VS.

WILLIAM SAENGER ET AL., RESPONDENTS.

RESPONDENTS' BRIEF.

OPINION OF THE COURT BELOW.

The opinion is found reported in full in 101 S. W. Rep. (2d), p. 1046.

JURISDICTION OF THE COURT.

Jurisdiction invoked to grant a writ of certiorari must be plainly shown to exist, and not inferred.

The court of civil appeals, whose judgment is sought to be reviewed here, is an intermediate court of appeals of Texas over whose decisions the Supreme Court of Texas has appellate jurisdiction.

This appellate jurisdiction of the Supreme Court is coextensive with the limits of the state extending to all questions of law arising in cases brought to the court of civil appeals from final judgments of the trial courts, as fixed by Texas Civil Statutes, Article 1728, copied in full in petitioner's brief, page 57, and reading in part:

> "6. In any other case in which it is made to appear that an error of substantive law has been committed by the court of civil appeals which affects the judgment."
>
> "In all cases where the judgment of the court of civil appeals is a correct one and where the principles of law declared in the opinion of the court are *correctly* determined, the Supreme Court shall *refuse* the application; in all cases where the judgment of the court of civil appeals *is a correct* one but the Supreme Court is not satisfied that the opinion of the court of civil appeals in all respects has correctly declared the law, it shall dismiss the case *for want of jurisdiction.*"
>
> Acts 1927, 40th Leg., p. 214, Ch. 144, Sec. 1.

Petitioners here duly filed with the Supreme Court of Texas their application for writ of error in this case which was by that court "dismissed for want of jurisdiction" (Rec. 79).

Petitioners in their brief, at page 24, make the statement, that, by "want of jurisdiction," as used in the dismissed order:

> "The Supreme Court did not mean that it was without jurisdiction of the cause within the general meaning of that term, but merely that it regarded the judgment by the court of civil appeals as cor-

rect, but that it was not satisfied that the said opinion in all respects had correctly declared the law as provided by the Texas statute prescribing the 'appellate jurisdiction' of the Supreme Court."

This conclusion is not justified by anything in the law.

It is apparent that if petitioners' contention that the judgment of the court of civil appeals failed or refused to give "full faith and credit" to the judgment of a sister state, an error of substantive law has been committed, and that fact, standing alone, would *require* the *granting* of the writ by the Supreme Court. Such an application could not be "dismissed for want of jurisdiction" on the assumption that the judgment of the court of civil appeals was correct regardless of reasons that might be given in justification of such refusal.

It is therefore impossible for the Supreme Court of Texas to dismiss "for want of jurisdiction" the application for writ of error upon the theory that the denial of this federal right was *correct*. In that event the writ must be refused. Other reasons must be found why the writ was "dismissed for want of jurisdiction."

Explanation for this order of the Supreme Court on the application may be found in the provisions of the statute and rules of that court.

Under the heading "Good cause to be shown," Article 1739 of the Texas Revised Statute in force states:

> "The Supreme Court may review final judgments of courts of civil appeals upon writ of error when good cause therefor be shown by application

for such writ, as hereinafter required, the sufficiency of such cause to be determined as herein provided."

Under the heading "Petition for writ of error," Article 1740, provides:

"A writ of error before the Supreme Court may be applied for by petition addressed to said court and the petition shall contain *such other requisites* as may be prescribed by the Supreme Court" (see Arts. 1739 and 1740, at p. 58, Petitioners' Brief).

The Supreme Court passed rules governing applications for writs of error under this statute, which were in force at the time this application was made.

Rules of the Supreme Court, 121 Texas 745.

(These rules in full as reported in 121 Texas, *supra*, are found on page 1087 *et seq.*, Moffett's Texas Form Book, 7th Edition, and Stayton's Method of Practice in Texas Courts, page 626 *et seq.*, wherein the statutes are also fully set out.)

Rule 1 under the heading "Requisites" reads:

"(a) Applications for writs of error (3) shall be *absolutely true to the record;* and (4) shall conform to the requirements herein prescribed and the provisions of the statute. For a *failure to observe* the above requisites the court may require the application to be amended so as to conform thereto, and in case of an obviously negligent or purposeful failure to observe them, may on its own motion or that of opposing counsel *dismiss the application* 'for want of jurisdiction.'"

Continuing the reading of the rules to Subdivision (F), that provision reads:

> "There shall be contained in one of the first sections of the application and immediately following a brief statement of the case, if such statement is made, a subdivision entitled;
>
> 'GROUNDS OF JURISDICTION'
>
> in which subdivision it shall be made to affirmatively appear that the case is one of which the Supreme Court has jurisdiction under Art. 1728, as amended by Ch. 144 of the Acts of the 40th Leg., and in which it shall further affirmatively appear (omitting provisions intervening) Subdivision (6) if the case be one in which an error of substantive law has been committed by the court of civil appeals, it must be made to *affirmatively appear from the application* not only that such error was committed but the manner in which the same injuriously affected the plaintiffs' right to recover, or the defendants' right to maintain his defense."

The application for writ of error in this case, as shown in the record before this court (Rec. 75), makes no effort to comply with this rule of the court. It contains no "grounds of jurisdiction" and such requirement under the rules of the court is of such importance as to fully justify the Supreme Court, under the rules, to dismiss the writ *"for want of jurisdiction,"* as provided by the rule.

This is at least showing full authority and power in the Supreme Court to dismiss the application for writ of error in this case without inspecting it further than

to determine that it was not in compliance with its rules.

If the order entered by the Supreme Court on this application is not thus justified; other reasons would have to be found, as it could not be possibly based on the view of the petitioners presented in this case.

It might be justified on another apparent ground. Noting the requirement in the rules (3) "shall be absolutely true to the record" and in this connection, consider the first assignment of error presented in this application which contains the following statement:

> "The petition alleged that *after* the judgment on the cross action had been entered, the *statutory trustees* and successors of the Beaumont Export and Import Company *retained* Richard F. Bailey as their attorney and authorized him to enter *their* appearance in said cause pending in the Superior Court of California for the purpose of setting aside the said judgment and for filing an answer to the cross action, and that said trustees, through their said duly authorized attorney, *did make their general appearance in said, filed motion to set aside said judgment* and thereupon joined issues as to *all of the facts* relating to whether or not the service obtained against the Beaumont Export and Import Company on the cross action was proper and sufficient under the laws of California and therein litigated all the fact issues, *relating to jurisdiction* and the court having found against them on all of said fact issues, and having found that the service was adequate, and having entered judgment to that effect, all of said issues became *res judicata* and said statutory trus-

tees are therefore estopped to assert the said service was insufficient under the laws of California and they thereby waived all defects or lack of service."

Looking to plaintiff's petition to which the general demurrer was sustained and from which order the appeal had been perfected, the fact statements contained in the assignments of error *are not true to the record.*

The petition, in aid of its conclusions, attaches as exhibits thereto and as parts thereof, exhibits containing the papers referred to as justifying such conclusions. The action taken by Mr. Bailey speaks for itself and is set out in full in the record (Rec. 29). It expressly states that "plaintiff and cross defendant, *Beaumont Export and Import Company, a Texas corporation,* will move said court for its order setting aside the default, etc." (Rec. 29). The grounds of that motion do not raise any question as to the jurisdiction of the court, *contrary* to the statement contained in this assignment. The grounds are stated in this notice as follows:

> "That said judgment was entered against plaintiff and cross defendant through the mistake, inadvertence, surprise or excusable neglect of plaintiff's and defendant's and cross defendant's counsel" (Rec. 29).

The Supreme Court of Texas could reasonably, under its rules, have dismissed "for want of jurisdiction." This applies because it was not "absolutely true to the record."

If these or other reasons caused the Supreme Court of Texas to "dismiss for want of jurisdiction" petitioners'

application, then, this appeal and the right to the petition for certiorari here would be controlled by such opinions of this Honorable Court as *John* v. *Paullin,* 231 U. S., 58 L. Ed. 381, and the writ of certiorari would be denied.

Petitioners here had the *right of appeal* to the Supreme Court of Texas, the highest court of that state, for a revision and correction of any errors of law committed by the court of civil appeals in this case. The fact that they negligently or willfully *failed to invoke* the appellate jurisdiction of that court in the *manner provided by law* and because of *that fact* they failed to obtain the judgment of that court upon the merits of their controversy, this court will not in the exercise of its jurisdiction grant any relief.

Wherefore, respondents respectfully move the court to dismiss this proceeding.

SUMMARY OF ARGUMENT.

I.

The Beaumont Export and Import Company, a Texas corporation, having been legally dissolved prior to the time the action against it was instituted and being nonexistent from that time and at the time the judgment in said action was rendered, such proceeding and judgment is void.

II.

The substituted service of process on Bailey as agent in California of Beaumont Export and Import Company, a Texas corporation, was ineffective as conferring jurisdiction over the company or its representatives authorizing the California court to render the personal judgment against it.

III.

Proceedings had in the California court subsequent to the entry of the judgment here sued on are ineffective as giving to such judgment any validity.

ARGUMENT.

May It Please the Court:

We will cite few authorities, indulging the presumption that in view of legal principles discussed, it will be unnecessary.

I.

The Beaumont Export and Import Company, a Texas corporation, having been legally dissolved prior to the time the action against it was instituted and being non-existent from that time and at the time the judgment in said action was rendered, such proceeding and judgment is void.

It is admitted, the common law is in force in Texas and California. At common law "after a corporation has become effectually dissolved" such dissolution "destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man" (*Orange Lumber Co.* v. *Toole,* 181 S. W., at p. 825).

This established rule is the law of Texas and California, except, in so far as it has been changed by statute in those states.

The Beaumont Export and Import Company, a corporation created by and existing under the laws of Texas, was legally dissolved on September 15, 1930 (Rec. 13), and the petitioners' suit was filed in the California court against it November 7, 1932 (Rec. 23), and the final personal judgment against it thereon, by default, was

entered May 24, 1933 (Rec. 26). The pleading is against it, a living corporation which "*is now*, and was at all times hereinafter mentioned, duly organized and *existing* under the laws of the State of Texas" (Rec. 21), and the judgment is against it as "a Texas corporation" (Rec. 26).

If, therefore, this personal judgment by default against a corporation organized and dissolved legally in Texas, entered in a proceeding begun after its dissolution, in the courts of California, is valid, it must acquire its validity from some statute. Certain statutes of California were duly pleaded (Rec. 8) and, in connection with existing Texas statutes, relied on as giving validity to the proceeding and judgment (Petitioners' Brief 64).

These statutes abrogate the common-law rule that upon dissolution of the corporation its real property reverts to the grantor, its personal property escheats to the sovereign and all debts owing by or to it are extinguished. Their intent, and effect is to provide for the preservation and control of its properties for the benefit of its stockholders and creditors after its dissolution in a somewhat similar manner in which the preservation and control of the properties and estate of an individual after his death is provided for.

The statutes of a state have no extraterritorial operation,

> *C., R. I. & P. Ry.* v. *Thompson*, 100 Tex., at p. 189,

and the courts of another state take no judicial notice of their existence. Before they may be con-

sidered for any purpose by the courts of another state, the jurisdiction of such courts must be invoked by plea and their existence and provisions proven as any other fact material to the rights claimed.

It would seem clear that Texas statutes could be relevant or have any bearing upon the question here, since no statute of that state was plead or reliance placed thereon or rights claimed therefrom, and hence, such statutes could have no effect, in any way, upon that proceeding.

Where "the public acts, records and judicial proceedings" of a state come before the courts of another state, they will be given "full faith and credit" and if, under existing statutes of the reviewing state, such "judicial proceedings" would be valid, if had in that state; then, in support of such proceedings had in the sister state, the courts of the reviewing state, in the absence of pleadings, will *presume* that statutes exist in the sister state of like kind.

Ferguson-McKinney D. G. Co. v. *Garrett,* 252 S. W. 739.

In the California proceeding no "public act, record or judicial proceeding" of Texas or its courts, was involved. There was no remote reference to any such. No "public act, record or judicial proceeding" of Texas, to which "full faith and credit" could be given. None such even referred to as existing.

The California proceeding was wholly one begun for personal judgment against a named nonentity; a corporation which had once been created by and existed

under the sovereign will of the State of Texas, but which had long since been dissolved and rendered nonexistent, by that same sovereign decree.

There was nothing shown in that proceeding by which the California court could assume or acqure jurisdiction to render a personal judgment by default against a legally dissolved, one time, Texas corporation. No thing there shown that such jurisdiction was invested in Texas courts. No statute, "public act, record or judicial proceeding" of Texas plead or claimed under which such any court, anywhere, could acquire or have jurisdiction to entertain such proceeding or pronounce such judgment. No statute or law of California could invest it with jurisdiction. None of the pleaded statute or laws of California may be construed as making such attempt or having such intent or effect. All such pleaded statutes apply alone to those corporations *created by that* state. Any attempt to give them extraterritorial force and application to corporations created by a sister state, would be absolutely void.

It is obvious, therefore, that the judgment here in question is nothing more than a personal judgment by default against a nonresident of the state, who was dead at the time the proceeding was begun and the judgment entered and over whose person the court did not have and could not, under any law, acquire jurisdiction to render such judgment and same is an absolute nullity everywhere, and that it is "not susceptible of ratification or conformation and its nullity cannot be waived."

Easterline v. *Bean*, 49 S. W. (2d) at page 429.

If what has been said is correct, further discussion would be surplusage; but the same final conclusion is reached by considering additional record facts.

II.

The substituted service of process on Bailey as agent in California of Beaumont Export and Import Company, a Texas corporation, was ineffective as conferring jurisdiction over the person of the company or its representatives authorizing the California court to render the personal judgment against it.

Bearing in mind the fact that the judgment here involved is a personal judgment by default against a Texas corporation, which had been legally dissolved by the state creating it, long prior to the time the proceeding in which the judgment rendered *was begun.*

To render such judgment, the court must have, at the time, jurisdiction over the *person* of the defendant.

While the pleading upon which the judgment was based is called "a cross action or cross complaint," we assume it correct as stated in plaintiff's petition here, Paragraph 4:

> "Under the applicable statutory provisions and the decisions of the courts of last resort of the State of California, a cross action or cross complaint is regarded, deemed and construed as another suit separate and distinct from the main action in which it is filed" (Rec. 4).

Jurisdiction over the "person" of the named defendant, was acquired, *if at all,* by the following proceeding:

One Rodolfo Montes, on November 7, 1932, filed in the Superior Court of the State of California in and for the County of Los Angeles, his "cross complaint" so styled, No. 279850, entitled *Beaumont Export and Import Company, a Texas Corporation, Plaintiff and Cross-Defendant,* v. *Rodolfo Montes,* in which it is stated:

> "Now comes Rodolfo Montes, by leave of court first had and obtained, and files this, his cross complaint against the plaintiff and cross defendant, and alleges as follows:
>
> (1) That the cross defendant is now, and was at all times hereinafter mentioned, *duly organized and existing* under the laws of the State of Texas" (Rec. 21). (Followed by fact statements with prayer for judgment.)

In same numbered and styled cause was filed, on November 12, 1932, "Affidavit of service of cross complainant and order permitting filing of cross complaint" signed by W. M. Eggeman and sworn to, reading:

> "W. M. Eggeman being sworn says: I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action: I served the copy of cross complaint and order permitting filing of cross complaint in this action by personally delivering to and leaving with the (fol. 40) following person at the County of Los Angeles on the date set opposite their respective names, a true copy thereof, to-wit: Richard F. Failey, by leaving with clerk in office, Nov. 9, 1932" (Rec. 24).

This service is claimed effective as conferring jurisdiction over the *person* of the named defendant under

Sections 1015 and 442 of the Statutes of California and Section 1011, Code of Civil Procedure. It is stated in plaintiff's petition:

> "All of the aforementioned statutory provisions of California, to-wit, Sections 442, 1011 and 1015, and the decisions of the courts of last resort of California construing the said statutes, constitute and embrace the law of the instant case applicable to obtaining proper service and giving adequate notice to the opposite party in cross actions" (Rec. 17-18).

The material portions of said respective laws, as set out in plaintiff's petition, Section 1011, headed "Notices and papers, when and how served," read:

> "The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:
>
> (1) If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office" (Rec. 8).

Section 442, styled "Cross Complaint" reads:

> "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happen- (fol. 33) ing or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer,

file at the same time, or by permission of the court subsequently, a cross complaint. The cross complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross complaint have not appeared in the action, a summons upon the cross complaint must be issued and served upon them in the same manner as upon the commencement of an original action" (Rec. 18).

Section 1015 designated "Service where defendant resides out of state" reads:

> "When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt" (Rec. 18).

It is clear that these statutory provisions do not relate in any way to a *"dissolved"* corporation either domestic or foreign. They contain no provision for service of process on any "dissolved" corporation. This fact is recognized by the act or amendment passed in California subsequent to the proceedings herein involved, shown on page 69, petitioners' brief, wherein, it is provided in Section 402 a, Civil Code:

> "Summons or process against a *dissolved* corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets, or if no such person can be found, to any person who is, or at the time of the dissolution was, an agent for service of process. If no such person can be found, summons or process may be served upon the dissolved corporation by delivering a copy thereof to the secretary of state, or an assistant or deputy secretary of state."

Of course, this statute is without operation here because passed subsequent to the transaction herein involved; could relate only to domestic corporations and was not pleaded in this action, and, if considered, shows upon its face that the service relied on in this case was *not such,* or upon the *person,* or in the *manner* stated in this act and would even there be ineffective as service.

The record in this case shows no law existent in California by which a *"dissolved"* corporation could be brought into court to answer a suit against it. By the Act of 1929 (Petitioners' Brief 67), it is provided that where corporations expire by their own limitation, forfeiture of charter by order of court, or otherwise dissolved, it continues to exist for the purpose of winding up their affairs, prosecute or defend actions by or against them and that unless other persons are appointed by the court, the *directors or manager of the affairs* of the corporation at the time of its dissolution *are trustees* of the creditors or stockholders or members of the corporation dissolved and have full power to settle the affairs of the corporation.

If this article of the California statute had any bearing upon a Texas corporation which had been dissolved (which it has not), then, these trustees act collectively in their aggregate capacity as a body and *not* as individuals and (quoting from Tex. Jur., Vol. II, p. 133, in Sec. 469),

> "An action to establish a liability of the corporation must designate all the surviving directors *as defendants,* and *all of them must be cited to appear and answer the plaintiff's demand.*"
>
> *Witherspoon* v. *T. & P. Ry. Co.,* 48 Tex. 309-319.
> *Corsicana Transit Co.* v. *Walton,* 189 S. W. 307 (s. c. 222 S. W. 979).

Under the Texas law governing Texas corporations, after dissolution, it could be sued; but *its trustees* were necessary parties to such action and indispensable as such, and the statute required that *they be served with citation.* No Texas statute provides that any person may be brought into court to answer a complaint by service of process on his attorney, whether he be in that case or some other case.

From the statutes of California, which we have considered, this appears to be the same rule there, because it is expressly provided that whereas certain *notices* may be served on the attorney, all *writs* and *process must be served on the party.*

The rule in Texas under its statute as passed on by the courts of that state and giving them effect is (quoting from 1 Tex. Jur., p. 147, in Sec. 106):

> "by them, actions against corporations which are dissolved *pendente lite* are viewed as suspended only;

new parties may be made; the assets may be distributed through a receivership or the corporation may be treated as continuing."

Lyon-Gray Lbr. Co. v. *Gibralter Life Ins. Co.*, 269 S. W. 80.

Abilene S. L. Co. v. *Shackelford*, 284 S. W. 622.

It is undoubtedly a correct rule of law as stated in *Cleveland* v. *Williams*, 29 Tex., at p. 214:

> "The death of the principal is an instantaneous and absolute revocation of the authority of the agent unless the power be coupled with an interest."

In *Hunt* v. *Rousmanier*, 5 L. Ed. 589, it is stated:

> "We think it well settled that a power of attorney though irrevocable during the life of a party becomes extinct by his death."

In 6 C. J., p. 675, the rule is thus stated:

> "The death of the client, or in the case of a corporation or partnership, *its dissolution vacates* the power of attorney and the latter is neither required *nor authorized* to do anything further."

Mr. Bailey, who was the surviving member of the law firm representing the Beaumont Export and Import Company, a living corporation, in its suit in California, ceased to be such attorney upon the legal dissolution of his corporate client.

This is material only, in that, from the date of the dissolution, under the law, Mr. Bailey was neither an attorney nor agent for the defendant Texas Corporation; therefore service on him, in any event, would be value-

less and any action that he might have taken *would be unauthorized.*

Indeed the California record, as presented here, conclusively shows that Mr. Bailey's actions were always in utter ignorance of the fact that his former client had been dissolved. No suggestion of that character was made to the California court and when the cross complaint was filed, it was expressly alleged therein that the defendant was an *existing corporation.* This allegation of corporate existence is necessary (*Bank of Alabama* v. *Simonton,* 2 Tex. 531), and although, even if the provisions of the Texas statute did not positively require such an allegation, it certainly contemplates the same, because "the reasons for this averment, if there are no others, are found in its purpose, which is to fix the venue of the suit and to inform the court and its officers *upon whom the service of the process should be made,* as well as to show the *capacity* of the *defendant* to sue and be sued." *G. H. & S. A. Ry.* v. *Smith,* 81 Tex. 479.

III.

Proceedings had in the California Court subsequent to the entry of the judgment here sued on are ineffective as giving to such judgment any validity.

The defendant in that judgment was a Texas corporation, it must dwell in the place of its creation and though it may do business in all places where its charter allows, wherever it goes for business it carries its charter, as that is the law of its existence. This charter is the same abroad that it is at home; whatever disabilities are placed upon the corporation at home it retains abroad and what-

ever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. Whenever it deals beyond the state of its creation it must be taken by those who deal with it as a creature of the law of its own state and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Every person who deals with such corporation subjects himself to such laws of the state of its creation affecting powers and obligations of the corporation with which he voluntarily contracts. To all intents and purposes he submits his contract with the corporation to such a policy of the sister state of foreign government and whatever is done by that creative sovereign in furtherance of that policy. He is conclusively presumed to have contracted with a view to such laws of that government or state, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony.

> "It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."
>
> *Canada S. R. Co.* v. *Gebhard,* 109 U. S. 27 L. Ed. at p. 1024.

Under the laws of Texas, the corporation, defendant in the judgment referred to, had been dissolved. Its dissolution put an immediate end to all of its corporate activities. Its officers, directors and agents ceased as such immediately. They, as such, had no further powers

of any kind. The corporate entity could not contract; could not have agents or representatives, and was as completely dead as an individual would be after death.

When the dissolution of the corporation occurred, the law of the state creating it, dissolved it.

By Texas statutes the directors of a corporation, at its dissolution "are designated trustees, because in discharge of the duties imposed upon them, they would not act under authority of the franchise and charter of the company, but merely as the representatives of its stockholders and creditors." They act as trustees collectively and not as individuals. As directors they no longer have the power and authority to act for the corporation *qua*, directors or officers.

Witherspoon v. *T. & P. Ry.*, 48 Tex. 309-319.

These directors undertaking to settle all the affairs of a corporation in the capacity of trustees after its dissolution are individually liable for breach of duty and their liability is that of trustees.

Comrads v. *Kasch*, 26 S. W. (2d) 732.

For this reason it is the holding of the Texas courts that while suit, after dissolution, may be brought or defended by the dissolved corporation, the trustees are indispensable parties. Otherwise, such trustees would not have complete control of the assets of the dissolved corporation.

When the California suit was brought against this dissolved corporation it was named defendant as "existing under the laws of Texas," a living, acting corpo-

rate entity. No where in the California proceeding is it disclosed that this corporation had been dissolved. If such disclosure had been made it would have placed it in the same status before the courts of that state as if it had been an individual who resided in Texas and who was dead.

The corporation had no power to act nor did it have any agents of any character to act for it. Suggestion of its dissolution would have stayed all proceedings. The trustees could have come in and shown by pleading their right under the Texas statute to be substituted for the defunct corporation as a party and to continue to litigate as such, but they are the only ones who could do that. The opponents of the corporate entity could have suggested its dissolution and sought under the provisions of the Texas statute to proceed with the litigation and in that event they could have made the trustees parties to the action and brought them as such and as individuals before the courts of that state if process, which would have that effect, could be discovered.

None of these things were done, however, and to do either of them, a statutory right and cause of action, as existing under the Texas laws would *have to be shown* and for that reason no recovery could be had and no further action taken and any contention made that such a right did exist under Texas statute is answered by the courts of Texas, thus:

> "It is argued that this state creates a cause of action and that the suit was brought to recover on the cause of action given by the statute. A suf-

ficient answer to this contention is that the suit is not based on the statute and the petition does not allege a cause of action within the statute. If plaintiff desired to recover on a cause of action created by the statute, it should have specifically pleaded the facts which show a cause of action under the statute."

Smith v. *Briggs-Weaver Mch. Co.*, 132 S. W. 954.

Petitioners contend that the defendants, respondents here, appeared through their attorney, Bailey, and undertook to set aside the default judgment and presented there the issue of the jurisdiction of the court over the person of the defendant to enter the judgment.

This contention is wholly misleading. The acts and proceedings speak for themselves and conclusively show that Mr. Bailey asssumed to act for an *existing* corporate body and that, too, without knowledge that it had been dissolved. This is apparent from the pleading he filed. He made no reference to the corporation having been dissolved. He made no reference to the existence of trustees or to the continuation of litigation by or against it. The sole allegation and bases for his motion is:

"That said judgment was entered against said plaintiff and cross defendant (shown by the pleadings to be an existing, living corporation) through the mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross defendant's counsel" (Rec. 29).

If Mr. Bailey had known at that time the corporation had been dissolved, he would have known that he

no longer had any authority to act for it in any capacity. That by its dissolution his authority as its attorney ceased for all purposes. He would have disclosed to the court that the corporation had been dissolved and thereby stayed any action on the part of the court in any of the pending proceedings. The court, upon that suggestion and proof of that fact, would unhesitatingly have vacated its judgment and held under its own laws that it was without jurisdiction to render such judgment. The question of jurisdiction to enter the judgment was *never before* the California court by pleading, proof, or suggestion and that court never considered that question or passed upon it, as disclosed by the record in this case.

These proceedings all took place after the rendition of the judgment and that judgment being void when rendered, could not be ratified or by action of the trustees or any other person, be validated.

CONCLUSION.

It is submitted that jurisdiction in this court has not been shown to exist and furthermore that the judgment of the court of civil appeals sought to be reviewed in this case is in all things correct in its conclusions of law and application thereof to the facts of this case;

Wherefore, respondents pray that the writ herein granted be dismissed or the judgment of the Court of Civil Appeals of Texas in all things affirmed.

OLIVER J. TODD,
Attorney for Respondents.

GEO. E. HOLLAND,
Of Counsel.